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**JUL 14 1994**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**FEDERAL COMMUNICATIONS COMMISSION**  
**OFFICE OF SECRETARY**

94-123

In the Matter of )  
Petitions, Applications and Related )  
Pleadings Regarding the Prime Time )  
Access Rule )

MMB File No. 900418A  
MMB File No. 870622A ✓  
MMB File No. 920117A

To: The Commission

**REPLY COMMENTS OF VIACOM INC.**

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July 14, 1994

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## SUMMARY

The breadth of factual disparities present in the initial comments in this proceeding emphatically demonstrate why the Commission should conduct its own fact finding, through a comprehensive Notice of Inquiry, on the Prime Time Access Rule's (PTAR) continuing role in promoting a healthy and diverse free, over-the-air television industry.

Opponents of the rule make two contradictory arguments: (1) PTAR has worked so well that it is no longer necessary; and (2) PTAR has resulted in a "perverse distortion" of the syndication marketplace with no public interest benefits. Neither is correct. PTAR has served and continues to serve the public interest by:

- increasing the number and types of programs available to the public,
- increasing the number and health of independent television stations, and
- increasing the number of national networks presenting viewing choices to America.

Although three companies now provide the bulk of first-run access period programming, the rule is not responsible for this. PTAR poses no barriers to entry in the syndication marketplace; rather, the market rewards success. To the extent that any market anomalies exist under PTAR, those variations are caused by exogenous factors -- most particularly the cyclical, hit-driven nature of the sale of off-network series. A Commission initiated marketplace study would reveal how supply and demand forces outside of PTAR are responsible for the current state of the off-network syndication marketplace.

As for the continuing efficacy of PTAR, one need only look at the fruits of its success, such as the emergence of first-run prime time syndicated series and the announced launches of two new broadcast networks, to see that it is a vital, yet unfinished symphony with continuing public interest benefits. The success of the Fox Network is due in large part to the base of economically viable independent stations PTAR helped create. At a time when

new networks are about to emerge, the Commission should be highly skeptical of any proposed changes to a rule that will help sustain those births.

Finally, those who call for a mere "modification" of PTAR through elimination of its off-network restriction are engaged in a ruse for the rule's total elimination. The record is clear on the inextricable relationship between the prime time hour limits and the off-network restriction -- elimination of the off-network restriction would effectively gut the entire rule and negate all public interest benefits realized by it. Further, allowing more network affiliates to air more reruns makes no significant contribution to diversity.

For these reasons, and because the Supreme Court's recent must carry decision lays to rest all challenges to PTAR's constitutionality, Viacom respectfully urges the Commission to initiate a Notice of Inquiry on the continuing benefits PTAR provides to the American public. In making that inquiry, the Commission must also consider the effect of the scheduled sunset of its network syndication ban on PTAR's continuing contributions to a diverse syndication marketplace.

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To: The Commission

Reply Comments of Viacom Inc.

Viacom Inc. ("Viacom") hereby submits the following Reply Comments in response to the Commission's April 12, 1994 Public Notice seeking comments on the above-captioned requests, applications and associated pleadings.

INTRODUCTION

The Commission has now received initial comments on three requests<sup>1</sup> to modify or repeal the Prime Time Access Rule (PTAR). 47 C.F.R. § 73.658(k).<sup>2</sup> Despite widely diverging views on the public interest benefits of the rule and its continuation, there is one

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<sup>1</sup> See FCC Public Notice, Petitions, Applications and Related Pleadings Regarding the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, released April 12, 1994.

<sup>2</sup> The Prime Time Access Rule prohibits network affiliated stations from filling more than three of the four prime time hours with network programming and precludes network affiliates in the top fifty markets from airing programs previously aired on a network ("off-network programs"). Exceptions are made for certain types of programs (e.g., news, public affairs, documentaries, and children's programs). See 47 C.F.R. § 73.658(k).

matter on which all commenters agree: the television syndication marketplace has changed substantially since the Commission's 1971 adoption of PTAR. Disagreement arises over the extent to which those changes were the result of, or promoted by, PTAR. For example, commenters differ on whether PTAR is necessary to sustain the thriving first-run syndication industry that exists today; whether it actually promotes source, outlet and program diversity; and whether it is necessary to sustain the health of independent television stations in the increasingly fragmented television marketplace.

As explained more fully below, Viacom believes these wide factual disparities require the Commission to conduct a Notice of Inquiry (NOI) on critical issues of fact relating to PTAR's continuing role in promoting the public interest in a healthy and diverse free, over-the-air television industry.

**I. Allegations of a "Perverse Subsidy" Require An Agency Notice of Inquiry and Specific Fact Finding.**

When the Commission adopted PTAR it knew it was creating an artificial market for the airing of non-network programs. It did so in the hope that this restricted time period would spawn new programs, stronger independent stations, and alternative broadcast networks.<sup>3</sup> In each instance, PTAR has been an unqualified success. It is this very success that now causes opponents of the rule to decry it as a "perverse subsidy" that benefits only a few first-run syndicators at the expense of the production of quality network (and thus, off-network) programs.<sup>4</sup> Viacom disagrees. PTAR is only one of many factors that affect the supply and demand of off-network programs. Moreover, to the extent that any subsidy exists, Viacom asserts that its benefits serve the public's (rather than disgruntled network program suppliers') interests.

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<sup>3</sup> See Prime Time Access Rule, Report and Order, 23 FCC 2d 382, 386-397 (1970) ("PTAR Order").

<sup>4</sup> See Comments of the Coalition to Enhance Diversity ("Disney Coalition") at 6-15, Comments of the United Church of Christ at 5-7, and Comments of the Network Affiliated Stations Alliance at 3-4.

In light of this disagreement, the Commission should engage in a specific fact finding to identify all the factors affecting the supply and demand of syndicated off-network programs and then determine what public interest benefits PTAR continues to promote.

**A. Factual Disputes On the Existence and Cause of Any Declining Market for Off-Network Syndications Must Be Resolved.**

Opponents of PTAR, such as the Disney-led Coalition to Enhance Diversity ("Disney Coalition"), would have the Commission believe that prices for off-network syndications are governed entirely by PTAR. Yet the sale of off-network programming is a cyclical, hit-driven process governed by the available supply of "hit" series ready for syndication and the demand for them. For example, some years ago one hour dramas, such as *Magnum P.I.*, were demanding the highest prices in off-network syndications, while more recently half-hour situation comedies, such as *Seinfeld* or *Cheers*, have reigned supreme.<sup>5</sup>

Viacom asserts that the sudden "drop" in license fees the Disney Coalition points to in its comments<sup>6</sup> was caused not by PTAR, but by an overabundance of situation comedies hitting the syndication marketplace simultaneously. Indeed, the Disney Coalition concedes the existence of an oversupply of off-network programs as it makes the singularly self-serving argument that the rise of new networks (such as Fox and the soon-to-be launched Paramount Network) harms the public interest by decreasing the prices program producers receive for their product!<sup>7</sup>

A marketplace study would reveal how supply and demand forces outside PTAR are responsible for the state of the off-network syndication marketplace today. Moreover, such

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<sup>5</sup> See e.g., "Sitcoms: Off-net on a Roll," *Broadcasting and Cable*, April 4, 1994, p.22.

<sup>6</sup> Disney Coalition Comments at 14.

<sup>7</sup> "Not only has the demand for off-network programming decreased, but the supply of such programs has increased dramatically -- thus further depressing [its] syndication value . . ." Disney Coalition Comments at 13 (emphasis added).

study would also enable the Commission to evaluate the historic evidence with respect to the effect of the ebb and flow of advertising dollars on the cyclical rise and fall of off-network syndication sales.<sup>8</sup> A Notice of Inquiry would allow the Commission to determine what, if any, distorting effects PTAR has on the off-network syndication market.

**B. Even If PTAR Creates a Subsidy for Independent Stations, That Subsidy Runs to the Public's Benefit.**

Strong independent stations help promote many of the Commission's public interest goals: they promote localism in news and public affairs; they strengthen the UHF service; and they provide an economic base from which new broadcast networks may be formed. Opponents of the rule argue that PTAR's off-network restriction unfairly "subsidizes" independent stations by precluding network affiliates from bidding for off-network product -- and thus reducing (or subsidizing) the price. But what opponents ignore is the obvious result of the auction they advocate.

Without PTAR an unrestricted auction of off-network series would occur, and would be won (as the proponents of such auction admit<sup>9</sup>) by the richer network affiliates. Thus, network affiliates would outbid the independent stations, leaving the weaker broadcasters to air less popular programs and thus receive fewer advertising dollars, thereby diminishing their ability to form the economic foundation for new networks as well as undermining their independent financial health. Consider the innate silliness of that result: if network affiliates in the top fifty markets are allowed to bid on off-network programs and thus pay more money to program suppliers there will be: (1) harm to independent stations; and (2) the

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<sup>8</sup> Again, even the opponents of PTAR recognize the "unbreakable cyclical relationship between the amount of advertising revenues, the amount of program spending, and the size of the viewing audience" affecting off-network program sales. Disney Coalition Comments at note 37.

<sup>9</sup> Disney Coalition Comments at 10.



substitution of one deeper-pocketed station buyer for another with no new programming for the public.

The opponents of PTAR allege this is an impermissible "marketplace distortion," but Viacom believes this alleged "distortion" serves the public interest. Many laws and regulations have distorting effects. For example, the Commission's minority distress sales program,<sup>10</sup> the cable system anti-trafficking rule,<sup>11</sup> and the recently adopted PCS "entrepreneur's block" all distort the free functioning of communications markets. The distortions these rules cause are tolerated because they are seen to promote a greater good.<sup>12</sup> Indeed, the courts have consistently found that the test for whether market distortions are legally valid is not whether a particular industry segment is benefited over another, but whether that benefit serves the public interest: "a rule adopted for the public interest often makes some segments of an industry richer and some poorer. What is prohibited is that these be [its] goals."<sup>13</sup>

If the Commission does find that PTAR distorts the syndicated program markets, it must then ask whether any distortions the rule causes are outweighed by their benefits to the public interest.

## **II. A Fact Finding Is Appropriate To Verify PTAR's Continuing Contribution To Diversity.**

Opponents of PTAR put forth two contradictory theories for its modification and repeal: (1) that it does not promote diversity and instead has resulted in a "triopoly" control

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<sup>10</sup> See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3002 (1990).

<sup>11</sup> 47 U.S.C. § 537.

<sup>12</sup> "The [PCS] Order reflects a philosophy that the PCS market should provide sufficient opportunities to 'democratize' the ownership of our PCS structure nationwide." FCC Press Release, "Commission Adopts Competitive Bidding Procedures for Broadband PCS," Separate Statement of Commissioner Andrew Barrett, pp. 1-2 (June 29, 1994).

<sup>13</sup> National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 534 (2d Cir. 1975) ("NAITPD").

of the syndication marketplace; and (2) it has been so successful in promoting diversity that it is no longer necessary. Yet neither is true. Moreover, PTAR is necessary to ensure future increases in diversity such as the launch of new broadcast networks.

**A. If It Ain't Broke, Don't Fix It.**

PTAR has served and continues to serve the public interest by increasing diversity in programming and distribution. As the court reviewing the Commission's 1974 modifications to PTAR noted, PTAR serves "the three-fold purpose (1) of curtailing the licensee's dependence on the networks for product; (2) of affording an opportunity for diversity of programming; and (3) of encouraging new sources of production (and, one might add, of distribution)." <sup>14</sup> To those who say PTAR is no longer necessary Viacom says: "If it ain't broke, don't fix it." The significant increases in diversity created by PTAR are dependent on a marketplace structure that includes PTAR. If PTAR is eliminated, not only will the chances for future increases in diversity be reduced, but the existing diversity created by the rule will be threatened as well.

**1. Historical Increases in Source, Program and Outlet Diversity**

PTAR has increased diversity by increasing both the number and types of programs from which viewers may choose and the number of stations on which they may watch them. Opponents of the rule argue that PTAR has not been responsible for these increases in diversity and point to the fact that the bulk of first-run syndicated programming is supplied by three companies as a basis for elimination of the rule. Their argument overlooks several important facts.

First, there is now a competitive, thriving first-run access period syndication marketplace, whereas before the rule there was not. The rule is not responsible for the fact

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<sup>14</sup> Id. at 536.

that today's six most successful first-run programs are distributed by three companies<sup>15</sup> (King World, Fox and Paramount<sup>16</sup>). The television syndication market rewards success and those companies simply have been successful in creating and distributing programs that appeal to television stations, audiences and advertisers. PTAR poses no barriers to entry in this market.<sup>17</sup> Indeed, those who complain the most about this situation (Disney) have simply been unsuccessful -- so far -- in their efforts to crack this market. Also, they confuse program distributors with program creators. Paramount distributes many programs actually created by others. For example, Paramount distributes *The Price is Right* which is produced by Mark Goodson Productions. Labeling Paramount as the source of all the programs it distributes is inaccurate.

Second, focusing on source diversity (who produces the programs) fails to take note of the program diversity (the number and types of programs) and outlet diversity (who airs the programs) that has occurred as a result of PTAR. The marketplace changes agreed upon by virtually all commenters demonstrate that both program and outlet diversity have increased since PTAR's adoption. Indeed, as Viacom noted in its initial comments, there are over 135 first-run programs presently being syndicated and the number of independent stations has grown from 122 in 1970 to over 380 today.<sup>18</sup>

PTAR has also helped increase program diversity in time periods outside the access period. Today there exists a strong and growing market of network-quality first-run syndicated programming for prime time. This could not have occurred without PTAR. By

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<sup>15</sup> As the Seventh Circuit noted in its affirmation of the Commission's 1993 finsyn rules, "... it is many years since anyone knowledgeable about antitrust policy thought that concentration by itself imported a diminution in competition. . . ." *Cap Cities/ABC v. FCC*, No. 93-3458, slip op. at 12 (7th Cir., decided July 12, 1994) ("1994 Finsyn Decision").

<sup>16</sup> Paramount is now a wholly-owned subsidiary of Viacom.

<sup>17</sup> Further, three strong new competitors may enter this market in the fall of 1995 with the scheduled sunset of the Commission's ban on network syndication. Such new entrants scarcely supports perpetuation of an alleged "triopoly."

<sup>18</sup> Comments of Viacom Inc. at 2.

giving syndicators a guaranteed time period during which they could sell their shows, the Commission made it possible for program producers to take the economic risks associated with first-run syndication. Once they were successful in the access period, the program producers were much more willing to launch programming in other time periods, even though they were not guaranteed access in those periods. For example, it was Paramount's original syndicated success with *Solid Gold* that encouraged it to expand its syndicated offerings to the point where it offered prime time syndicated series such as *Star Trek: The Next Generation*. Further, syndicated prime time series launches are aided by the cross-promotional capabilities independent stations have with the large audiences they draw during the access period, which also form solid lead-ins to the new series.

PTAR is directly responsible for much of the increased source, program, and outlet diversity we enjoy today. Opponents of the rule, at least those recognizing that there have been increases in diversity, argue that these increases have come despite the rule. In the face of these differing assertions, the Commission should conduct its own factual inquiry and marketplace analysis to determine the role PTAR has played, and continues to play, in promoting diversity.

## 2. Public Affairs Increases

Opponents of PTAR argue that it has not resulted in an increase in the number of news and public affairs programs aired on independent stations. Of course, this is a convenient argument since it is virtually impossible to draw a direct correlation between increased revenues in one time period (such as the access period) and the acquisition or production of any particular programs aired by an independent station. However, Viacom notes that local public affairs programs are not station profit centers. Rather, they are loss leaders, which independent broadcasters could not afford to air without the revenues they receive from the access period. In other words, because PTAR has enhanced (if not created)

the profitability of independent stations, those stations can now afford to air local news and public affairs programs fulfilling their public service responsibilities without risking their financial health.

Moreover, the Commission has already found that the increased revenues independent stations earn during the access period do, in fact, enable them to support local programming:

The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations. . . . [W]e believe that by enhancing the financial well-being of independent stations, the 'fringe hour' revenue stream inevitably helps to support local programming efforts. . . . [S]uch efforts further enhance program diversity.<sup>19</sup>

In illustration of this point, Viacom notes that it has used the increased revenue its stations earn during the access period to offer such public affairs programs as *Capital Notebook*, a government and political issues roundtable; *For My People*, a forum on the problems and concerns of the African-American community; and *Straight Talk for Kids*, a magazine-style show for teens.

The question of whether independent stations actually air more news and public affairs programming now than before PTAR is a factual issue the Commission may easily resolve through a comprehensive NOI.

#### **B. PTAR Is Necessary to Ensure Future Increases in Diversity.**

As noted above, opponents of PTAR want to have it both ways: they argue that PTAR doesn't promote diversity; then they argue the reverse, that PTAR has worked so well it is no longer necessary. Both are wrong. As detailed above, PTAR's contributions to diversity are easily established. As for PTAR's continuing efficacy, one need only look at the

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<sup>19</sup> Financial Interest and Syndication Rules, Memorandum Opinion and Order, 8 FCC Rcd. 8270, note 64 (1993), not for review denied, *Cap Cities/ABC v. FCC*, No. 93-3458 (7th Cir., decided July 12, 1994) (citations omitted).

fruits of PTAR's success, such as the emergence of first-run prime time syndicated series and a strong fourth network, to see that it is a vital, yet unfinished symphony, with continuing public interest benefits yet to be heard.

### 1. Birth of New Networks

The success of the Fox Network is due in large part to the base of economically viable independent stations PTAR helped create. This increased competition to the established broadcast networks, a long-standing Commission goal. Because the rule facilitates the launch and growth of new networks, the Commission should be wary of any changes to it. This is especially true now, when we are about to see the launch of two new broadcast networks which will also need a base of economically viable independent stations in order to succeed.

In lining up affiliates for the Paramount Network, one of the key factors the network looks at is the strength of potential affiliates in the 6-8 p.m. access period. Success in the access period shows that the station is financially secure, is able to deliver audiences, and can be an effective "lead-in" to network programming in the 8-10 p.m. prime time period. Eliminating PTAR will result in a huge roadblock to new networks by undermining the base of economically viable independent stations necessary for a successful launch.

### 2. Dangers of Finsyn Elimination

In its initial comments, Viacom pointed to the current and coming changes in the syndication marketplace because of the relaxation and scheduled elimination of the financial interest and syndication (finsyn) rules as a reason for moving cautiously on any proposals to modify or eliminate PTAR.<sup>20</sup> Opponents of the rule, while pointing to general marketplace changes since PTAR was adopted as support for their position, failed to address the radical

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<sup>20</sup> Viacom Comments at 4-8.

changes the syndication marketplace will go through with this relaxation and scheduled sunset of the finsyn rules. As Viacom noted, these changing circumstances will make any information the Commission gathers on PTAR and the syndicated marketplace prior to November 1995 almost immediately outdated.

Viacom reiterates its position that the Commission must know with certainty how the syndicated marketplace functions in the absence of finsyn before altering a rule that has helped that marketplace grow. Moving cautiously in this area is not irrational; rather, it is appropriate and justified in light of the public interests at stake.<sup>21</sup>

### **III. Separation of the Off-Network Restriction From the Rule Is A Ruse for Total Elimination.**

Most opponents of PTAR are willing to allow its prohibition against network programs airing in more than three of the four hours of prime time to continue, but instead want to see its off-network restriction eliminated.<sup>22</sup> For the Commission to do so, however, would effectively gut the entire rule and negate any public interest benefits realized by it.

#### **A. Without the Off-Network Restriction, PTAR Is Ineffective.**

The Commission itself recognized the inextricable relationship between the prime time hour rule and the off-network restriction when it adopted that restriction: "Off-network programming may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule."<sup>23</sup> Opponents have failed to show that

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<sup>21</sup> As the Seventh Circuit noted in its recent affirmation of the Commission's 1993 finsyn rules, "[W]e cannot pronounce [an] agency arbitrary and capricious for deciding to proceed in a more cautious manner that will enable it to observe the operation of a partially deregulated market before allowing deregulation to become complete." 1994 Finsyn Decision, slip op. at 14.

<sup>22</sup> Disney Coalition Comments at 1-2, Comments of NBC at 4-5, Comments of CBS at 3-4.

<sup>23</sup> PTAR Order, 23 F.C.C. 2d at 395.

PTAR would have any effectiveness or promote any public interest benefits without the off-network restriction.<sup>24</sup>

The off-network restriction is the key to PTAR's success. As King World notes in its comments, access to the strongest stations in the largest markets is an absolute necessity for success in the first-run programming market.<sup>25</sup> Repeal of the off-network restriction will allow affiliates to outbid independent stations for the most popular off-network programs, causing the independent stations to lose audience, advertisers, and cross-promotional opportunities. This will severely curtail their competitiveness and deprive the public of the contributions to diversity these stations make.<sup>26</sup>

Before the Commission takes any action to modify or eliminate PTAR, it must ascertain the role PTAR's off-network restriction plays in achieving the goals of the rule. Although the Commission has already recognized that the goals of the rule would not be achieved without the off-network restriction, an NOI would provide the necessary evidence for the Commission to reaffirm this conclusion.

**B. Allowing More Network Affiliates to Air More Reruns Makes No Significant Contribution to Diversity.**

Most parties favoring elimination of PTAR's off-network restriction argue that it impedes diversity by restricting affiliate programming discretion during the access period and make moving arguments about how the top 50 market affiliates are unable to serve their local

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<sup>24</sup> Opponents of the off-network restriction also argue that it fails to help the independent stations most in need of assistance, those below the top 50 markets. But the real focus of the rule is increasing the diversity of voices available to the American viewing public. Hence, the off-network restriction is applicable only in those markets where the majority of Americans reside -- the top 50 markets. Viacom acknowledges that there are several weak independent stations outside the top 50 markets that might benefit from PTAR's off-network restriction. Accordingly, the Commission may wish to consider extending the rule below the top 50 markets.

<sup>25</sup> See Comments of King World at 3-7.

<sup>26</sup> See Comments of Media Access Project at 11-14.



communities as well as they would like because of PTAR. Yet the remedy they seek would authorize one thing and one thing only -- allowing network affiliates to air one additional hour of network reruns.

This change certainly would not make affiliates significantly more responsive to the needs of their communities. Nor would it serve the public interest. As the Commission concluded in adopting the off-network restriction, "it is definitely in the public interest to encourage the development of a body of new (not repeat) programs outside the network process, and thus provide opportunity for the development of new program approaches and ideas."<sup>27</sup>

#### **IV. The Supreme Court's Recent Must Carry Decision Puts to Rest All Constitutional Challenges to PTAR.**

As noted in our initial comments, the constitutionality of PTAR has already been upheld. Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2nd Cir. 1971). First Media continues to argue that the Commission's 1987 fairness doctrine decision precludes further use of spectrum scarcity as a justification for broadcast regulation.<sup>28</sup> Yet as recently as last month, in its decision regarding the must carry provisions of the 1992 Cable Act, the Supreme Court expressly approved the scarcity rationale as a valid basis for broadcast regulation:

Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here.<sup>29</sup>

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<sup>27</sup> Prime Time Access Rule, Second Report and Order, 50 F.C.C. 2d 829, 836 (1975) ("PTAR III"), aff'd in part and rev'd in part sub nom. National Ass'n of Independent Television Producers and Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975) (emphasis added).

<sup>28</sup> Comments of First Media at 5-15.

<sup>29</sup> Turner Broadcasting System, Inc. v. FCC, No. 93-44, slip op. at 13-14 (June 27, 1994) (emphasis added).

Further inquiry into the constitutionality of PTAR would appear moot. Nevertheless, it is possible that opponents of the rule will cite the Court's discussion of permissible limits on broadcasters' discretion over programming choices<sup>30</sup> as evidence of PTAR's alleged constitutional invalidity. However, such arguments ignore the fact that PTAR, just like the must-carry provision, is not "designed to favor or disadvantage speech of any particular content."<sup>31</sup> Rather, PTAR is content-neutral: it restricts the programming discretion of network affiliates only with respect to a category of programming, off-network reruns of all sorts, rather than on the basis of their content.

In short, the Commission need not trifle further with First Amendment challenges to PTAR.

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<sup>30</sup> "... [O]ur cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices." *Id.* at 27 (internal citations omitted).

<sup>31</sup> *Id.* at 28.

**CONCLUSION**

The record before the Commission emphatically demonstrates one thing: a number of critical factual issues on the efficacy of PTAR are in dispute. These issues must be resolved by the Commission *before* it makes any proposals with respect to the retention, modification or repeal of PTAR. A comprehensive NOI is the best vehicle for that necessary factual resolution. Finally, PTAR cannot be segmented into the "off-network" restriction and the rest of the rule, for to do so would destroy the rule in its entirety.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Joel Timmer, do hereby certify that true and correct copies of the foregoing Comments were served this 14th day of July 1994 by first class mail, postage prepaid, upon the following:

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